IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 19, 2007

WILLIAM C. TOMLIN, JR. v. STATE OF TENNESSEE

Appeal from the Circuit Court for Williamson County
No. CR 03950 Timothy L. Easter, Judge

No. M2006-01664-CCA-R3-PC - Filed July 17, 2007

The Petitioner, William C. Tomlin, Jr., appeals as of right from the judgment of the Williamson County Circuit Court denying post-conviction relief. In 2003, a jury convicted the Petitioner of aggravated burglary and theft over $1000, and he received consecutive sentences of fourteen years and ten years respectively. On direct appeal, this Court affirmed his convictions and modified his aggravated burglary sentence to twelve years. Subsequently, the Petitioner filed a petition for post-conviction relief and, following an evidentiary hearing, the post-conviction court denied relief. He now appeals, arguing that he received the ineffective assistance of counsel due to trial counsel's failure to file a pretrial motion to suppress the State's fingerprint evidence. After a review of the record, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Angela R. Hoover, Franklin, Tennessee, for the appellant, William C. Tomlin, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Derek K. Smith, Assistant District Attorney General.

OPINION

Factual Background

In April of 2003, the Petitioner was convicted by a Williamson County jury of aggravated burglary and theft of property valued between $1000 and $10,000. The Petitioner was sentenced as a Range III, persistent offender to consecutive terms of fourteen years for the aggravated burglary conviction and ten years for the theft conviction. On direct appeal, a panel of this Court affirmed the convictions and modified the sentence for aggravated burglary from fourteen to twelve years. See State v. William C. Tomlin, Jr., No. M2003-01746-CCA-R3-CD, 2004 WL 626704 (Tenn.

Crim. App., Nashville, Mar. 30, 2004). As summarized on direct appeal, the facts underlying these convictions are as follows:

> At about 8:30 on the morning of November 2, 2000, Alice Means left her house in Franklin to go work in the store she and her husband owned. Her husband, Fred Means, had already left the house. Between 11:00 and 11:15 that morning, Ms. Means received a telephone call from her housekeeper, Nancy Ranchino. Ms. Ranchino told her that, when she arrived at the Means' house to clean it, she discovered that the master bedroom had been ransacked. Ms. Means immediately went home and found that someone had "wrecked" her bedroom. The drawers of her dresser had been pulled out, clothes were strewn everywhere, and several jewelry containers that had been stored in the dresser drawers were on the floor, empty. One particular item that Ms. Means described was a Fossil watch tin that had contained one of her husband's watches. She had kept that tin in a dresser drawer, but she found it empty on the floor. The total value of the items taken from the Means' house was $7,355.
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> Ms. Means also discovered that the back door of her house was unlocked. She testified that the lock had been tampered with, as though someone had "hit the lock" and "scratched and damaged" it. A spare key to her house was found under the outside ledge of her kitchen window. Apparently the previous owner of the house had alerted the Means to the presence of a spare key, and the Means had searched for it. However, they had been unable to locate it, even though they searched under the ledge of the kitchen window where the key was found after the break-in. Further inspection of the door by police officers revealed that some kind of metal object was broken off in the door lock. Although the door was damaged, it did not appear that the door had been forced open because the tumblers in the lock were not broken.
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> In July 2000, the Means had the interior of their house painted by Todd Smith. Mr. Smith and his crew returned in October 2000 to paint the exterior of the house. The [Petitioner] had been employed by Mr. Smith as a painter and worked on both jobs at the Means' house. The [Petitioner] and the other painters finished their work on the exterior of the house approximately one week before the break-in.
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> Ms. Means testified that her home telephone reflected that she had received telephone calls at 10:29 a.m. and 10:36 a.m. on November 2 from a Sherwin-Williams paint store located approximately five minutes from her house. Two of the employees at the Sherwin-Williams store remembered seeing the [Petitioner] in the store on November 2. The store manager, Scott Beasley, testified that he also remembered seeing the [Petitioner] in the store on November 2, and he remembered the [Petitioner] using the store phone on that date. No one else at the Sherwin-Williams store would have had any reason to call the Means' residence.

> Detective Rick Hagan of the Williamson County Sheriff's office testified that he dusted the Means' residence for fingerprints. He lifted nine latent fingerprints, one of which he lifted from the Fossil watch tin. Hoyt Phillips, a fingerprint examiner with the Tennessee Bureau of Investigation, testified that he received nine cards containing latent fingerprints lifted from the Means' residence. Only one of those fingerprints was useful for comparison. Mr. Phillips identified the fingerprint lifted from the Fossil watch tin as being from the [Petitioner's] right middle finger.
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> Detective Hagan interviewed the [Petitioner] as part of his investigation. When Detective Hagan asked the [Petitioner] where he had been on November 2, 2000, he replied that he had been working for a tire store on Dickerson Road in exchange for a discount on a set of tires. However, he was unable to remember the name or address of the store. When the detective told the [Petitioner] that he had been seen at the Sherwin-Williams paint store in Franklin, he answered that he had been in the store to buy a gallon of paint. When the detective confronted the [Petitioner] with the fact that one of the store employees remembered the [Petitioner] using the phone on November 2, he responded that he had used the phone because he was trying to contact his former employer, Todd Smith, so he called the Means' house looking for him. However, Mr. Smith testified that the [Petitioner] knew his cellular telephone number and his office number, but he had received no messages from the [Petitioner]. He testified further that there was no reason for the [Petitioner] to think he was at the Means' residence on November 2.

Id. at *1-2.

On March 7, 2005, the Petitioner, pro se, filed a petition for post-conviction relief. The petition was amended by counsel and, thereafter, contained nine allegations of ineffective assistance of counsel. A hearing was held on the petition on July 5, 2006. After hearing all of the evidence presented, the post-conviction court denied relief by written order on July 31, 2006. This timely appeal followed.

ANALYSIS

On appeal,[1] the Petitioner raises the single issue of whether he was denied the effective assistance of counsel when trial counsel did not file a pretrial motion to suppress the fingerprint evidence. On direct appeal, this Court noted the following facts relevant to this issue:

> As part of his investigation, Detective Hagan dusted for fingerprints a soda can that he found in the trash at the Means' house. Ms. Means testified that she emptied the

[1] We note that this specific allegation of ineffective assistance was not contained in either the Petitioner's pro se petition for post-conviction relief or his amended petition. See Tenn. Code Ann. §§ 40-30-104(g), -106(d). However, testimony was received on the issue at the post-conviction hearing, and the post-conviction court found that the Petitioner received the effective assistance of counsel. Accordingly, we deem the record sufficient to allow appellate review of the issue.

> trash when she left on the morning of November 2, and the housekeeper testified that she did not drink a soda that morning. Therefore, Detective Hagan believed that the can had been discarded by the perpetrator. After he dusted the can for fingerprints, he threw it away due to a lack of space in the evidence locker. After Agent Phillips examined the fingerprint samples that were sent to him, he prepared a report that stated that the fingerprint lifted from the "metal can lid" belonged to the [Petitioner]. Detective Hagan assumed that "metal can lid" referred to the soda can. However, the day before the trial began, Detective Hagan learned that "metal can lid" did not refer to the soda can, but to the Fossil watch tin. Detective Hagan promptly reported such to defense counsel, but the watch tin had already been returned to Ms. Means and cleaned. Therefore, there was no possibility that the print remained. Defense counsel moved to suppress the fingerprint evidence. The trial court ruled that, because the [Petitioner] did not move to suppress the print when it appeared that the discarded soda can was the source, he was in no worse position after learning that the watch tin was the source, because it had not been preserved either. The trial court did instruct the jury on the State's duty to preserve evidence.

Tomlin, 2004 WL 626704, at *2. Specifically, the Petitioner contends that, if counsel had filed a motion to suppress pretrial, the "'problem' of where the [Petitioner's] fingerprint was actually found would have been discovered two months before the trial, not after the trial had begun." The Petitioner also asserts that the "filing of a suppression motion in a timely manner would have altered the complexion of this case in a real and dramatic way."

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's

conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

On direct appeal, the Petitioner argued that "the fingerprint evidence should have been suppressed because Detective Hagan was initially mistaken about where the latent fingerprint was located, and the tin watch box was not preserved by the police." Tomlin, 2004 WL 626704, at *2. In concluding that this issue was without merit, this Court reasoned as follows:

> A trial court's decision to admit or exclude evidence will not be disturbed on appeal absent an abuse of discretion. See State v. James, 81 S.W.3d 751, 760 (Tenn. 2002). To constitute an abuse of discretion, the trial court must have applied an incorrect legal standard or "reached a decision which is against logic or reasoning that caused an injustice to the party complaining." Id. (citations omitted).
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> Claims regarding the States's [sic] duty to preserve possibly exculpatory evidence are governed by State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999). "Generally speaking, the State has a duty to preserve all evidence subject to discovery and inspection under Tennessee Rule of Criminal Procedure 16, or other applicable law." Id. at 917. However, the evidence must be material, which means it "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonable available means." Id. If the evidence is material and the State failed in its duty to preserve the evidence, there are several factors for the trial court to consider regarding the consequences of the breach, including: the degree of negligence involved; the significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and the sufficiency of the other evidence used at trial to support the conviction. See id.
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> In this case, the [Petitioner] has failed to show that the Fossil watch tin appeared to constitute exculpatory evidence or that it was, consequently, material.

> Even if the tin could be deemed material evidence, the [Petitioner] has failed to show bad faith on the part of the State or that the fingerprint that was lifted from the watch tin is unreliable. Agent Phillips testified that he preferred to receive the actual item from which a fingerprint had been taken, but it was not unusual for him to be given only the lifted print. Furthermore, he testified that a lifted print is either identifiable or it is not; there is no chance of a bad lift resulting in a misidentification. Therefore, the reliability of the fingerprint has not been called into question. We conclude that proceeding to trial without the evidence being preserved by the State did not deprive the [Petitioner] of a fundamentally fair trial. See id. at 914. Therefore, the trial court did not abuse its discretion by refusing to suppress the fingerprint that was lifted from the Fossil watch tin.

Tomlin, 2004 WL 626704, at *3.

At the post-conviction hearing, trial counsel testified that he filed a petition for independent analysis of the fingerprint lifted "from a metal can lid" and that, following grant of the request, he hired Dr. Larry S. Miller. Trial counsel testified that the fingerprint "was reported in the discovery to have been lifted from the lid of the Coke can" and that it was "conveyed to [him]" that the Coke can had been thrown away. Trial counsel stated that he learned "maybe a month or two" before trial "that the Coke can was no longer in existence." After trial began, trial counsel discovered that the print was actually lifted from "a Fossil brand watch metal tin box." He requested to see the box in order to have it analyzed but was informed it had been returned to the victims. The victims brought the box to trial counsel but, "at that point, the Fossil watch box had already been wiped off . . . . " Trial counsel then requested suppression of the fingerprint evidence:

> I just came back in after that break and moved in limine to suppress the evidence because at that point, it became clear to me—two things were clear that I was concerned with. Number one, I tried to get the Coke can before because I wanted a DNA saliva test to see if [the Petitioner's] saliva might have been in that Coke can or not been in that Coke can. And the second thing was: My fingerprint man told me, Dr. Larry Miller and later Holt Phillips, the TBI man, both said it's better if we can have the object that the fingerprint came from and that object had been thrown away. And Detective [Hagan] said that they threw it away because there wasn't room in the evidence locker.

Trial counsel stated that he questioned Detective Hagan regarding the chain of custody surrounding the watch box.

On cross-examination, trial counsel testified that he "[brought] out to the jury that, in fact, there was a Coke can that the police department, the sheriff's department had neglected to lift prints on[.]" He stated that he "yelled it out in closing[,] . . . waived it at them like a flag." Trial counsel also said that he pointed "out to the jury that the watch box that the print was lifted on . . . , was later wiped off thereby not giving [the Petitioner] the opportunity to do [an] independent test on that[.]"

Lee Dryer, a former assistant district attorney, testified that he informed trial counsel the day before trial that the print actually came from the watch box rather than the Coke can and that he was "livid with the detective . . . . " Mr. Dryer testified that he did not recall a pretrial motion to suppress filed:

> [M]y recollection is there was not, and the reason I remember that—if you're talking about a written motion—I had talked with [trial counsel] several times . . . about Rule 12 and its requirements and that I thought he was being very sly with me. And I thought he would raise it at trial so that jeopardy would attach which is probably now that I'm a defense lawyer is exactly what I would have done.
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> But I do remember talking with him about the requirements of Rule 12 and that any of those types of issues needed to be addressed before trial.
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> However, the judge over my objection, ruled on the issue anyway. And I believe his remedy for that was to give a limiting Ferguson instruction if I remember correctly.

Mr. Dryer further stated that he believed he had trial counsel "beat on the case law" regarding suppression of the fingerprint evidence and that he would have handled the issue "exactly the same way" as trial counsel.

The Petitioner testified that he spoke with trial counsel several times about the Coke can and that he was aware trial counsel hired an expert to review the fingerprint evidence. According to the Petitioner, trial counsel informed him "the day before trial" that the detective had made a mistake and that the print actually came from the watch box. The Petitioner requested that trial counsel object to the fingerprint evidence. According to the Petitioner, trial counsel said that "they never got the fingerprint off of a Coke can because I asked him how come he dismissed the fingerprint expert. And he said we didn't need him because they had throwed [sic] the Coke . . . can away and the fingerprint never came off the Coke can, it came off of a tin box." The Petitioner denied being at the house on the day of the burglary.

The post-conviction court held that the Petitioner had "failed to prove by . . . clear and convincing evidence that the assistance of counsel that he received at trial was ineffective." We agree. Considering this Court's conclusions on direct appeal, the post-conviction court's ultimate conclusion that trial counsel was more credible than the Petitioner, and given that the Petitioner did not present clear and convincing evidence that counsel was deficient, we conclude that the Petitioner has failed to demonstrate that his counsel was ineffective.

CONCLUSION

For the foregoing reasons, we conclude that the trial court did not err by denying the Petitioner post-conviction relief. Accordingly, the judgment of the Williamson County Circuit Court is affirmed.

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DAVID H. WELLES, JUDGE